EX PARTE OR LATE FILED DOCKET FILE COPY ORIGINAL **ORIGINAL**

North American Wireless, Inc.
1919 Gallows Road
Vienna, VA 22182
Fax: 703-760-3230

November 3, 1994

DOCKET FILE COPY ORIGINAL

RECEIVED
NOV 3 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William E. Kennard, General Counsel
Federal Communications Commission
1919 M Street, N.W.; Room 614B
Washington, D.C. 20554
MAIL STOP CODE: 1400

Re: North American Wireless, Inc. Proposals for Ensuring the Long Term Participation of Designated Entities In the Provision of Personal Communications Services
PP Docket 93-253

Dear Mr. Kennard:

We at North American Wireless, Inc. ("North American") appreciate the time you and your associates generously devoted to meeting with us on Tuesday. As North American discussed at that meeting, it has been considering a number of means to increase designated entities' access to capital and to enhance the prospects for commercial success of designated entity-owned systems. Reviewed briefly below are several specific proposals that we believe will not only increase designated entities' ability to obtain the funding necessary to acquire, construct, and operate radio systems, but also to ensure their long term viability and continued participation in the provision of personal communications services ("PCS").

First, North American believes the Commission should consider two options that would have the combined effect of increasing lenders' willingness to commit capital to designated entity PCS systems. As the Commission has noted in a number of contexts, access to financing on favorable terms is perhaps the most critical issue facing prospective designated entity entrants. To a certain degree, this problem is compounded by existing Commission policies that do not allow creditors to obtain a perfected security interest in a Commission issued radio authorization. For creditors, the inability to obtain a security interest under the Uniform Commercial Code in a license means both that a loan cannot be secured against what is

No. of Copies rec'd 0+4
List A B C D E

generally the most valuable of a licensee's assets and that a creditor has no ability to intervene in the conduct of a licensee's business to preserve the assets in the event of default. In conjunction, the current policies have a chilling effect on lenders' willingness to commit funds to non-established radio operations.

North American does not advocate wholesale revision of the Commission's security interest policies. However, North American believes that the Commission could address the effects of the policies on financiers' willingness to fund new operations in a manner that is consistent with existing policy:

- *The Commission should permit licensees to enter into contractual agreements that contemplate a secured interest in the capacity of a radio system.* Because creditors are unable to obtain a secured interest in an FCC-issued authorization, courts have held that a creditor's security interest does not include the "going concern" valuation of a radio operation. However, if a licensee could offer a creditor the ability to obtain a security interest in the capacity available on a radio system, the value of the security interest would be substantially increased, as well as the lender's ability to commit capital to the operation. In effect, a security interest in the capacity of a system would provide a closer reflection of the "going concern" value of the system without creating any semblance of property rights in the license itself. Some analogies to this arrangement include "indefeasible right of use" agreements used in submarine cable ventures and satellite transponder sales. Accordingly, North American seeks confirmation from the FCC that lenders could contractually acquire a security interest in the capacity of a PCS system consistent with FCC policies.

- *The Commission should facilitate creditor's ability to assume of control of a licensee's operations under contractual authority.* Even if creditors are able to obtain security interests that are a closer approximation of the "going concern" value of a radio system, creditors are unlikely to make capital readily available to new market entrants absent some assured ability to intervene upon default to preserve the value of the assets. Under current policies, a creditor must first force a licensee into bankruptcy and have a court appoint a receiver. Unfortunately, not only is this process a lengthy one, it also provides opportunities for abuse and gamesmanship by the debtor or other unsecured creditors. As the Commission has recognized in the hostile take-over context, such actions are not the intended result of the FCC's policies. In those circumstances, the FCC has routinely used its authority under Section 309(f) of the Communications Act to permit a short form transfer of control to a neutral trustee pending approval of a long form transfer of control. The FCC has also used in Section 309(f) authority to approve

> short form transfers of control in cases where a licensee is "legally disabled." North American believes that these policies should be extended to allow a creditor, under contractual authority, to have control of a licensee transferred to a trustee specified in the contract on a temporary basis using a short form application without the licensee's consent, even if bankruptcy proceedings have not been initiated. In such situations, the trustee would be able to preserve the assets of the system until it is able to find a suitable designated entity to acquire the system.

North American does not believe that either of these proposals is inconsistent with established Commission precedent. Indeed, similar proposals have been advanced Competitive Bidding proceeding and in similar contexts. At the same time, the net effect of these proposals would be to significantly increase the ability of designated entities to access needed capital for PCS operations.

Second, the short form applications for the block C and F licenses should not be due until after the completion of the Major Trading Area ("MTA") auctions. While North American recognizes the importance of avoiding unnecessary delays, in the interests of attracting investment and ensuring the fullest possible opportunity for designated entities to participate in the provision of broadband PCS, the Commission should not require designated entity applicants to tender their short form applications until a reasonable time after the completion of the block A and B MTA auction. In this manner, non-designated entities who were unsuccessful in acquiring licenses on blocks A and B will have an opportunity to invest in designated entities. These potential partners may be unwilling to commit themselves to such a partnership arrangement with designated entities prior to the completion of the MTA auction. In addition, the auction of blocks A and B will produce price information that will be valuable to designated entities in their business planning. For these reasons, the submission of short form applications for the entrepreneurs' block licenses should be deferred until a reasonable time after the completion of the MTA auction.

Third, the FCC should conduct separate simultaneous multiple round auctions for the block C and F licenses. In the *Fifth Report and Order*, the Commission divided frequency blocks A, B, C, D, E and F into three groups. The FCC combined the entrepreneurs' blocks (blocks C and F) in Group 2 and stated its intent to auction these Basic Trading Area ("BTA") licenses together in a simultaneous multiple round auction. However, given the large number of BTAs to be auctioned, and the extreme differences in size among both the BTA service areas as well as the spectrum allocations, North American believes that the Commission's goals of keeping the auction process simple and manageable and fostering designated entity participation would be served better by conducting a separate simultaneous multiple round auction for the block C licenses, followed by a simultaneous multiple round auction for the block F licenses. Any minimal administrative delay in auctioning the BTA spectrum allocations from largest to smallest would be outweighed by the benefits of administrative simplicity and the possibility of increased participation by designated entities.

Fourth, the FCC should adopt additional deferred bidding credits. To ensure the long term continuation of designated entity participation in the provision of PCS, North American supports adoption of a deferred bidding credit for these entities upon completion of the five year holding and limited transfer period. For example, designated entities who continue to hold their licenses in the sixth year after initial grant would be entitled to a certain percentage reduction in the principal amount due or be permitted to amortize their payments over a longer term. The percentage reductions or length of the amortization period would increase throughout the balance of the license term. This measure would preserve opportunities for designated entities and avoid undue concentration of telecommunications licenses by providing an incentive for designated entities to remain as long term players in the PCS business.

Finally, designated entities should not be subject to equal access obligations. Imposing equal access obligations on CMRS systems operated by designated entities would impede their ability to gain adequate financing on reasonable terms. As the record in Docket No. 94-54 demonstrates, equal access would impose substantial costs on mobile carriers. It would require designated entities to design their networks less efficiently, to pay for expensive switch software and hardware of use only in providing equal access, and to engage in resource-intensive balloting and allocation procedures. Equal access also would effectively preclude designated entities from negotiating volume discounts from long distance carriers, the savings from which otherwise could be invested in system construction or passed through to subscribers. For these reasons, designated entities should not be subject to equal access obligations for at least five years after licensing.

Like the Commission, North American is strongly committed to the success of designated entities in the long term provision of PCS. We at North American believe that the prospects for viable designated entity systems will be substantially enhanced by the rule changes and interpretations discussed above. These measures are narrowly tailored to address the most egregious of the roadblocks facing designated entities that seek to participate in PCS. Should you wish any further information or elaboration on these proposals, we would be happy to meet with you again at your earliest convenience.

Respectfully submitted,

NORTH AMERICAN WIRELESS, INC.

James Valentine

James Valentine

cc: Robert M. Pepper
Donald H. Gips
Sara F. Seidman
PP Docket No. 93-253 (4)